IN THE COURT OF APPEALS OF THE STATE OF ALASKA

FRANCIS MARK ROACH, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12350 Trial Court No. 3KN-12-667 CR MEMORANDUM OPINION No. 6772 — February 20, 2019

Appeal from the Superior Court, Third Judicial District, Kenai, Carl Bauman, Judge.

Appearances: Elizabeth W. Fleming, Attorney at Law, Kodiak, for the Appellant. Charles D. Agerter, Assistant Attorney General, Office of Special Prosecutions, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg, Judges.

Judge WOLLENBERG.

In *Faretta v. California*, the United States Supreme Court held that criminal defendants have a constitutional right under the Sixth Amendment to reject the assistance of counsel and represent themselves.[1] The right of self-representation is also protected

[1] *Faretta v. California*, 422 U.S. 806, 819 (1975).

by the Alaska Constitution.[2] Defendants may invoke this right, even if such a decision seems foolish or ill-advised.[3] But the right of self-representation exists alongside the constitutionally guaranteed right to the assistance of counsel, and between the two, the right to representation by counsel is "paramount."[4]

Due to the importance of the right to counsel, and the dangers associated with self-representation, courts must indulge in every reasonable presumption against waiver of the right to counsel.[5] Accordingly, a trial judge is not obligated to undertake a thorough, on-record inquiry into a defendant's request for self-representation unless the defendant's request is clear and unequivocal.[6]

Furthermore, even when a defendant has seemingly made a clear and unequivocal request for self-representation, the court need not hold a hearing if the defendant's conduct indicates that he is vacillating on the issue or that he has abandoned

---

[2] *McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974).

[3] *See, e.g.*, *James v. State*, 730 P.2d 811, 814 n.1 (Alaska App. 1987) ("Except in the most unusual circumstances, a trial in which one side is unrepresented by counsel is a farcical effort to ascertain guilt.") (quoting 1 *ABA Standards for Criminal Justice* § 6-3.6 cmt. at 6.39-40 (2d. ed. 1982)).

[4] *Shorthill v. State*, 354 P.3d 1093, 1109 (Alaska App. 2015); *see also Knix v. State*, 922 P.2d 913, 918 n.6 (Alaska App. 1996) (noting that "the right to counsel is clearly dominant, and [the] right to self-representation is clearly subordinate").

[5] *Brewer v. Williams*, 430 U.S. 387, 404 (1977).

[6] *Johnson v. State*, 188 P.3d 700, 703 & n.4 (Alaska App. 2008). The clear and unequivocal requirement rests on two primary rationales: (1) "it acts as a backstop for the defendant's right to counsel, by ensuring that the defendant does not inadvertently waive that right through occasional musings on the benefits of self-representation"; and (2) it "prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation." *Id.* at 704 (quoting *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989)).

his request altogether.[7] For instance, courts in other jurisdictions have held that a defendant abandoned a previous request for self-representation when the defendant did not reassert the request after the trial court failed to conclusively rule on it, or when the defendant demonstrated through his conduct that he had voluntarily accepted representation by counsel.[8]

In this case, Francis Mark Roach was charged with multiple property offenses. On three separate occasions prior to trial, Roach's attorney filed a request for a representation hearing, indicating that Roach wanted to represent himself at trial. On each occasion, the court scheduled a representation hearing to address Roach's dissatisfaction with his attorney and his desire to represent himself — but ultimately, Roach proceeded to a jury trial with the assistance of counsel. Roach was convicted of a single merged count of scheme to defraud.

---

[7] *See Johnson*, 188 P.3d at 704 ("[E]ven when a request for self-representation appears on its face to be unequivocal, a judge need not conduct a formal inquiry when the record as a whole shows that the seemingly unequivocal request is in fact tentative.").

[8] *See, e.g.*, *Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982) (en banc) (concluding that the defendant abandoned his original request for self-representation after the judge deferred a ruling on the request, when (1) the defendant subsequently agreed to retain his counsel, (2) defense counsel reported that they had worked out their differences, and (3) the defendant never informed the court of a continuing desire to represent himself); *see also United States v. Barnes*, 693 F.3d 261, 272 (2d Cir. 2012) (holding that when a criminal defendant has moved to represent himself and the court has not entered a clear and conclusive denial, it is incumbent on the defendant to reassert his desire to proceed pro se, and his failure to do so, especially where he proceeds to cooperate with his appointed counsel, constitutes a waiver of his previously asserted right); *Wilson v. Walker*, 204 F.3d 33, 38 (2d Cir. 2000) (concluding that Wilson abandoned his request for self-representation when the request was left open for further discussion through two subsequent changes in attorney and Wilson never reasserted his desire to proceed pro se).

On appeal, Roach notes that he made clear requests to represent himself, and he argues that the trial court failed to properly inquire into whether he waived his right to counsel. Roach contends that the court's actions violated his right of self-representation. Having reviewed the record, however, we conclude that Roach abandoned each of his requests to represent himself.[9]

There is no question that Roach abandoned his requests to represent himself after the first and second representation hearings. At the first hearing, Superior Court Judge Carl Bauman conducted an on-record inquiry into whether Roach knowingly and intelligently waived his right to counsel.[10] After Judge Bauman explained to Roach the benefits of counsel and the dangers of self-representation, Roach decided to remain represented by counsel.

Roach argues that the trial court failed to conduct a sufficient inquiry into his desire to represent himself before he decided to continue with counsel. We disagree.

---

[9] We note that, relying solely on the log notes of the hearings, Roach's attorney incorrectly argued in her opening brief that the trial court "just blew by" all three of Roach's requests for self-representation. Roach's attorney also incorrectly asserted that the log notes were incomplete.

We remind attorneys that an appellant may not rely solely on hearing log notes to establish points that are essential to deciding the issues on appeal, and that such a deficiency may be fatal to an appellant's claim. *See Miscovich v. Tryck*, 875 P.2d 1293, 1304 (Alaska 1994); *see also* Alaska R. App. P. 210(b)(1)(A) (providing that an appellant shall designate for transcription all parts of the electronic record that are "essential to a determination of the issues on appeal"). We nonetheless have reviewed the transcripts, which were requested by the State prior to filing its responsive brief, and we proceed to decide Roach's claims.

[10] *See James v. State*, 730 P.2d 811, 813 (Alaska App. 1987) (discussing the need for an explicit, on-record inquiry to determine whether a criminal defendant seeking self-representation has knowingly and intelligently waived the right to counsel), *on reh'g*, 739 P.2d 1314 (Alaska App. 1987).

But in any event, the court told Roach that he could request a second representation hearing if he changed his mind — which Roach did.

At the second representation hearing (again before Judge Bauman), Roach did not appear, and he did not seek to reschedule the hearing. Accordingly, the court could properly find that Roach had abandoned his request.[11]

Whether Roach abandoned his third request for self-representation is a closer question. However, based on Roach's subsequent conduct, we conclude that Roach abandoned his request.

The third representation hearing was held in front of Superior Court Judge Charles Huguelet. Roach expressed dissatisfaction with his attorney and a desire to represent himself. He also told the court that he wanted to proceed with the representation hearing in front of the assigned judge, Judge Bauman, rather than Judge Huguelet. Judge Huguelet noted that Roach's case was set for a trial call that afternoon before Judge Bauman. Judge Huguelet told Roach that he could set a time for the representation hearing that afternoon when he appeared before Judge Bauman.

At the trial call that afternoon, Roach's attorney informed the court that there had been a representation hearing earlier that day, but that Roach wanted to address those issues with Judge Bauman. Judge Bauman noted that a representation hearing was scheduled earlier that day in front of Judge Huguelet, and then he mistakenly declared, "As I understand it, Mr. Roach chose not to participate. . . . Mr. Roach chose not to proceed with it." Neither Roach nor his attorney objected to Judge Bauman's characterization of the morning hearing, and Roach never said anything further about his desire to represent himself.

---

[11] *See, e.g.*, *United States v. Pryor*, 842 F.3d 441, 450 (6th Cir. 2016) (noting that the court may treat a defendant's refusal to attend proceedings as a waiver of the right of self-representation).

Judge Bauman's characterization of the morning hearing was inaccurate. Roach had participated in the hearing, and he had asked that the representation hearing be heard by Judge Bauman. Judge Huguelet granted Roach's request.

Despite Judge Bauman's error, however, neither Roach nor his attorney corrected the judge. And in the remainder of the discussion, which focused on Roach's health needs and the question of when Roach's case would go to trial, Roach never again mentioned the question of self-representation or indicated in any other way that he was unwilling to proceed with counsel.

In fact, Roach said that he wanted to meet with his attorney to prepare for trial. During a discussion about scheduling the trial, Roach said, "I'd like to meet with my [attorney]. . . . I'd like . . . to meet up with him, too. I haven't had a chance to do that." His attorney responded that "we can make that happen" and acknowledged that Roach was eager to go to trial. Several minutes later, Roach's attorney added that, although contact with Roach had previously been sporadic, "I know we have those issues resolved now. Those were resolved in front of Judge Huguelet this morning." (This same attorney had appeared with Roach at the morning hearing.)

As a whole, the comments by Roach and his attorney indicate that, although Roach and his attorney may not have worked out their differences directly with Judge Huguelet at the morning hearing, they had apparently resolved their differences, and Roach intended to continue with representation by his attorney. Roach never again requested a representation hearing or reasserted his desire to represent himself.

Given this record, Judge Bauman was under no duty to conduct a further, formal inquiry into Roach's right of self-representation.

Roach's case is distinguishable from our recent decision in *Massey v. State*.[12] In *Massey*, the defendant was unhappy with his appointed counsel and asked to represent himself.[13] The judge promised to conduct a self-representation inquiry at a future hearing, but at the future hearing, the judge failed to do so and proceeded with other matters over Massey's objection.[14] Later, when Massey tried to raise the matter with another judge, that judge mistakenly found — by misinterpreting past log notes — that the previous judge *had* conducted a self-representation hearing.[15] The second judge concluded that the matter had been resolved — again, over protest by Massey.[16]

Unlike Roach, Massey made repeated, unequivocal requests to represent himself. While the two cases share a common thread — *i.e.*, a judge mistakenly interpreting a previous hearing — Massey's objections stand in marked contrast to the statements by Roach and his attorney. In the wake of the trial judge's error, Roach expressed a desire to meet with his attorney, and his attorney suggested that they had resolved their communication issues. Judge Bauman could reasonably rely on the representations by Roach and his attorney that they intended to move forward with their attorney-client relationship.

We therefore reject Roach's claim that the trial court violated his right of self-representation.

---

[12] *Massey v. State*, ___ P.3d ___, Op. No. 2622, 2018 WL 5852650 (Alaska App. Nov. 9, 2018).

[13] *Id.* at *1.

[14] *Id.* at *1-2.

[15] *Id.* at *2.

[16] *Id.*

Conclusion

We AFFIRM the judgment of the superior court.